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IN THE

Supreme Court Of The United States

KAREN HOWSAM, individually and as Trustee for the E. Richard Howsam, Jr. Irrevocable Life Insurance Trust dated May 14, 1982

Petitioner,

v.

DEAN WITTER REYNOLDS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE AND AARP IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

Trial Lawyers for Public Justice ("TLPJ") and AARP respectfully submit this brief as *amici curiae* in support of neither party urging the Court to make clear that even a broad arbitration agreement covering disputes over the arbitrability of claims (as petitioner alleges is before the court) does not relieve courts of their duty under the Federal Arbitration Act to determine the threshold questions of whether the parties entered into an agreement to arbitrate and, if so, whether the agreement is enforceable under applicable state contract law.

TLPJ is a national public interest law firm specializing in precedent-setting and socially significant civil litigation. In prosecuting cases throughout the federal and state courts, TLPJ seeks to advance consumers' and victims' rights, environmental protection, civil rights and civil liberties, workers' rights and workplace safety, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. TLPJ has become concerned over a trend whereby an increasing number of businesses are imposing mandatory arbitration systems against consumers in an attempt to cap their own liability and take away their victims' right to go to court. Four years ago, TLPJ established a Mandatory Arbitration Abuse Prevention Project to combat these abuses. During this time, we have been contacted repeatedly by consumers, and by their lawyers, who wished to pursue their claims through the civil

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37.3(a), letters of consent to file this brief from petitioner and respondent have been filed with the Clerk of the Court.

justice system and have their cases heard by a jury of their peers, but were unable to do so because of mandatory arbitration imposed by businesses. While TLPJ supports alternative dispute resolution that is truly consensual between the parties, our research and investigation have convinced us that, in many cases, corporate abuses of mandatory arbitration deny consumers access to a meaningful forum for the resolution of their legal claims.

AARP is a nonprofit, nonpartisan organization with more than 35 million members aged 50 and older. As the largest membership organization representing the interests of older Americans, AARP is greatly concerned about widespread fraudulent, deceptive, and unfair practices in a broad range of marketplace transactions, since older people are disproportionately victimized by many of these practices. AARP thus supports laws and public policies designed to protect their rights and to preserve the means for them to seek legal redress when they are harmed in the marketplace. An increasing number and range of businesses have, during the last several years, started to impose binding arbitration as a condition of obtaining products and services. AARP has filed *amicus curiae* briefs in this Court, as well as federal appellate courts and state supreme and appeals courts, addressing the importance of preserving court access for consumers, especially those with relatively small amounts in dispute, and ensuring that they can seek the full range of remedies that Congress and state legislatures enacted for their benefit. Consumers frequently must incur substantial costs when they are forced to have a dispute resolved in arbitration, and the arbitral forum often does not afford them many of the substantive and procedural protections they would have in court. These factors, combined with the unequal bargaining power of the parties to most consumer contracts, contribute to AARP's concern about

the contract formation process and underscore the importance of ensuring that courts retain their authority to determine the validity of contract provisions that otherwise seek to deprive consumers of access to court to resolve their underlying claims.

The parties in this case agree, as did both courts below, that the question presented requires examination of the Court's opinion in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). *Amici* have a strong interest in the resolution of this case because any discussion of *First Options* could have enormous implications for consumers who resist attempts by some businesses to impose one-sided and often abusive arbitration systems as a condition of entering into everyday transactions. *First Options* holds that under the Federal Arbitration Act ("FAA"),[2] questions of arbitrability, i.e., whether a claim is covered by the arbitration agreement at issue, are presumptively for courts to decide but may be decided through arbitration where parties clearly and unmistakably intended to arbitrate such questions. *Id.* at 945. *First Options* is cautious about extending arbitration clauses to cover matters other than the parties' underlying claims. But some businesses are now advancing an expansive interpretation of *First Options* that requires consumers to relinquish *all* meaningful access to court by compelling arbitration of the threshold FAA issues of whether they entered into an enforceable arbitration agreement in the first place. Fortunately, these businesses so far have had only limited success in advancing these arguments.[3]

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[2] 9 U.S.C. §§ 1 *et seq.*

[3] *Compare Prevot v. Phillips Petroleum Co.*, 133 F. Supp. 2d 937, 939-40 (S.D. Tex. 2001) (rejecting employer's claim that non-English speaking employees must arbitrate question of whether its mandatory arbitration clause is unconscionable); *American Gen. Fin., Inc. v. Branch*, 793 So.2d 738 (Ala. 2000), *cert. denied*, 122 S. Ct. 342 (Oct. 9, 2001) (No.

Because these arguments citing *First Options* threaten to eliminate all meaningful access to court for consumers and individual workers by unmooring arbitration from its statutorily mandated basis in a valid contractual agreement under the FAA, *amici* submit this brief asking the Court to explicitly define the outer boundaries of *First Options'* holding regarding the resolution of arbitrability disputes. The Court should make clear that the threshold issues of whether a party entered into an agreement to arbitrate and, if so, whether that agreement is enforceable are matters exclusively for judicial determination under the FAA, even where *First Options* would permit arbitration of *subsequent* arbitrability disputes over whether *an existing and valid* arbitration agreement applies to a particular dispute between the parties.

STATEMENT OF CASE

This case arose out of a misrepresentation claim that Karen Howsam ("Howsam"), an investor, filed against Dean Witter Reynolds, Inc. ("Dean Witter"), her brokerage firm. In 1992, Howsam signed a client service agreement containing a mandatory arbitration provision drafted by Dean Witter. Pet. App. 3a. The arbitration clause provided in relevant part that:

> The Client agrees that all controversies between the Client and Dean Witter and/or any of its officers, directors, or employees, present or former, concerning or arising from (i) any account maintained with Dean Witter by client; (ii) any transaction involving Dean Witter and Client, whether or not such transaction occurred in such account or accounts; or (iii) the construction, performance or breach of this or any other agreement between us, whether such controversy arose prior to, on or subsequent to the date hereof, shall be determined by arbitration before any self-regulatory organization or exchange of which Dean Witter is a member.

Id.

After Howsam's misrepresentation claim arose, she initiated arbitration against Dean Witter in early 1997 before the National Association of Securities Dealers (NASD). *Id.* at 4a. In submitting her claims to NASD arbitration, Howsam signed a submission agreement stating that her claims would be arbitrated in accordance with the NASD Code of Arbitration Procedure (NASD Code). *Id.* at 4a-5a. Section 10304 of the NASD Code creates its own limitations period for the filing of claims before the NASD, stating that "[n]o dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy." *Id.* at 5a.

Dean Witter responded by filing suit against Howsam in the United States District Court for the District of Colorado, seeking a declaration that Howsam's claims were untimely under the NASD's rules and seeking to enjoin the arbitration. Pet. App. 6a. Dean Witter argued that the timeliness of Howsam's arbitration filing is a question of the "arbitrability"

00-1934) (same, in case involving consumer subprime lending), *with Berkley v. H&R Block Eastern Tax Servs, Inc.*, 30 S.W.3d 341, 344 (Tenn. App. 2000) (adopting tax refund anticipation loan dealer's argument that under *First Options* "the parties may contract to arbitrate the question of the validity and enforceability of the arbitration clause itself.")

of her claims that must be decided by a court. *Id.* at 7a. The district court granted Howsam's motion to dismiss Dean Witter's claims, holding that the arbitration agreement contained sufficient evidence that the parties intended to submit disputes over the arbitrability of claims to arbitration. *Id.*

The United States Court of Appeals for the Tenth Circuit reversed, holding that the timeliness of Howsam's filing under the NASD Code was a question of arbitrability that must be decided by a court. *Id.* The court of appeals relied on this Court's ruling in *First Options* that disputes over the arbitrability of claims are presumptively for courts to decide unless there is clear and unmistakable evidence showing that the parties intended to arbitrate arbitrability disputes. Pet. App. 16a-17a. Because the court found that the arbitration agreement at issue here did not clearly and unmistakably demonstrate that the parties intended to arbitrate arbitrability disputes, it remanded the case to the district court for a determination of whether or not Howsam's arbitration filing was timely. Pet. App. 18a-19a and 27a-28a.[4]

SUMMARY OF ARGUMENT

In addressing which types of disputes raise arbitrability questions covered by *First Options*, the Court should make clear that the FAA always requires judicial resolution of the threshold questions of whether a party entered into an

[4] The court of appeals also rejected Howsam's argument that a choice of law provision in the 1992 client service agreement displaced Tenth Circuit precedent and required application of New York law, under which a similar arbitration clause was found to require arbitration of this same type of dispute. *See id.* at 19-20. The court found that federal arbitration law, rather than state law, applied to the resolution of this dispute over who decides the NASD limitations question. *Id.* at 22. *Amici* do not address this dispute between the parties.

agreement to arbitrate and, if so, whether that agreement is enforceable under applicable state contract law.

A party's right to have a court decide whether it entered into an enforceable arbitration agreement before the court orders arbitration of any claims is critical because arbitration is purely a matter of contract, not a freestanding right, under the FAA. The FAA's procedural provisions condition the authority of a federal court to issue an order compelling arbitration on the existence of an enforceable agreement to arbitrate between the parties before the court. *See* 9 U.S.C. §§ 3 and 4. Similarly, the Act's substantive provision applies the same rules of state contract law to arbitration agreements that apply to any other contract. *See* 9 U.S.C. § 2. The Court thus ruled in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), that a court, rather than an arbitrator, must resolve allegations of fraudulent inducement or any other bases for revocation that are directed specifically at an arbitration agreement before the court can enforce the agreement.

First Options does nothing to alter the FAA's baseline requirement of an enforceable agreement as the precondition to an order compelling arbitration. In ruling that disputes over arbitrability, i.e., whether a particular claim is covered by an existing arbitration agreement, are sometimes subject to arbitration, *First Options* does not address who decides the separate and antecedent questions of whether parties did in fact enter into an agreement to arbitrate and, if so, whether that agreement is enforceable. The Court's recognition in *First Options* that "the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter," 514 U.S. at 943 (emphasis in original), presupposes the existence of an enforceable agreement to arbitrate between the parties. *First Options* therefore is

consistent with *Prima Paint*'s ruling that courts, not arbitrators, must resolve disputes over the existence and enforceability of arbitration agreements. While most courts have correctly applied *First Options* only to disputes over the scope and interpretation of *existing* agreements, a small number of courts have adopted the arguments of businesses and improperly expanded *First Options* to serve as a basis for requiring arbitration of threshold disputes over whether parties entered into an enforceable agreement in the first place.

Since the question presented in this case requires the Court to discuss what constitutes an arbitrability question under *First Options*, the Court should make clear that arbitrability refers to disputes over whether an *existing and valid* arbitration agreement applies to a party's underlying legal claim. In so holding, the Court should state explicitly that *First Options* does not alter the FAA's baseline requirement that a court must, in the first instance, resolve any disputes over whether a party ever entered into an agreement to arbitrate and, if so, whether that agreement is enforceable under applicable state contract law. The FAA and this Court's repeated holdings should be read to establish that, *regardless* of the asserted contract language at issue, a party cannot be forced to relinquish its right of access to court and submit a claim to arbitration unless a court first determines that the party did in fact enter into a valid and enforceable agreement to arbitrate.

ARGUMENT

THE COURT SHOULD MAKE CLEAR IN DECIDING THIS CASE THAT THE FAA REQUIRES COURTS TO RESOLVE DISPUTES OVER THE EXISTENCE AND VALIDITY OF ARBITRATION AGREEMENTS.

Arbitration under the FAA is purely a matter of contract. Accordingly, "the FAA does not require parties to arbitrate when they have not agreed to do so . . ." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). In *First Options*, this Court recognized a presumption against requiring parties to arbitrate disputes over arbitrability because, as a matter of contract formation, parties are unlikely to consider this "rather arcane" issue when they enter into transactions. 514 U.S. at 945. Since *First Options* recognizes that arbitration of arbitrability disputes is *itself* purely a matter of contract just like arbitration of other disputes under the FAA, then it follows that courts must always decide the baseline questions of whether parties entered into an agreement to arbitrate and, if so, whether that agreement is enforceable under applicable state contract law.

A. The FAA's Text and the Decisions of this Court Demonstrate that Courts Always Must Determine the Existence of a Valid Agreement to Arbitrate.

The text of the FAA makes clear that a court must resolve all disputes concerning the existence and validity of an agreement to arbitrate before it can order parties to arbitrate their underlying claims. Section Four of the Act allows a federal court to order arbitration of disputes within its jurisdiction, but only "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith

is not in issue. . ." 9 U.S.C. § 4. Similarly, Section Three permits federal courts to stay litigation and order arbitration "upon any issue referable to arbitration under an agreement in writing for such arbitration . . .upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, . . .providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3. Finally, Section Two establishes the FAA's general rule of substantive law making written arbitration agreements enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The existence of an enforceable written agreement to arbitrate between the parties thus is a precondition to any court's authority to order claims into arbitration under the FAA.

Based on these provisions, the Court has recognized that the FAA requires judicial, rather than arbitral, resolution of disputes concerning the existence or revocability of arbitration agreements. In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), the Court held that a claim of fraud in the inducement of an entire contract that contained an arbitration clause was referable to arbitration under the FAA because the arbitration provision was severable from the disputed contract. *Id.* at 404. At the same time, the Court explained that a claim of fraud in the inducement of the arbitration clause *itself* would have to be resolved by a court based on the command of Section Four of the Act. *Id.*[5] *Prima*

[5] Although Section 4 did not directly apply in *Prima Paint* because the plaintiff had filed its substantive claims in court rather than arbitration, the Court held that both Sections 3 and 4 of the FAA require federal courts to consider "issues relating to the making and performance of the agreement to arbitrate." *Id.*

Paint ruled that this requirement was consistent with the overall "statutory scheme" of the FAA because:

> As the "saving clause" in § 2 indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, *but not more so. To immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract- -*a situation inconsistent with the "saving clause."

Id. at 404 n.12 (emphasis added). *Prima Paint* thus confirms that agreements to arbitrate are subject to challenge under the FAA based on the same requirements applicable to other contracts, and that the resolution of such challenges is exclusively a judicial function.

The Court's recognition in *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643 (1986), that parties might draft arbitration agreements that cover disputes over the arbitrability of claims does not relieve courts of *their* duty to determine whether the parties entered into a valid agreement to arbitrate in the first place. In *AT&T Technologies*, the Court addressed the allocation of authority between courts and arbitrators under collective-bargaining agreements entered into pursuant to Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a). The question presented was whether a court or an arbitrator should resolve an arbitrability dispute arising out of a collective bargaining agreement that contained an arbitration clause. *AT&T Techs.*, 475 U.S. at 644. The Court defined arbitrability as referring to questions of "whether a collective bargaining agreement creates a duty for the parties to arbitrate the particular grievance." *Id.*

at 649. Proceeding from this definition of arbitrability as referring to the scope or interpretation of an existing and valid agreement (facts that were not in dispute), *AT&T Technologies* held that the arbitrability of a particular claim "is undeniably an issue for judicial determination," but then qualified this holding by stating "[u]nless the parties clearly and unmistakably provide otherwise . . . ." *Id.*

The holding in *AT&T Technologies* that disputes over the scope of arbitration agreements should normally be resolved by courts is grounded in contract law. The Court found that "'[t]he duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty.'" *Id.* (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1964)). Thus, even where an asserted arbitration agreement would empower an arbitrator to determine the arbitrability of individual claims, a party has the right under federal law to a judicial determination as to the existence of an enforceable agreement to arbitrate.

In *First Options*, the Court applied to the FAA the principles set out in *AT&T Technologies*. *First Options* arose out of a stock clearing company's attempt to collect debts owed by a wholly owned investment company and its individuaal owners. Pursuant to an arbitration agreement between the companies, the creditor initiated arbitration against thee debtor company and against its two owners, who had not signed the agreement in their individual capacity. *First Optinons*, 514 U.S. at 940-41. The individuals contested the arbitrator's jurisdiction, and then sought judicial review of the arbitrator's assertion of jurisdiction over the claims against them. *Id.* The main question presented to the Court concerned the proper

standard of judicial review of the arbitrator's assertion of jurisdiction. *Id.* at 942.

The Court ruled that "because the Kaplans did not clearly agree to submit the question of arbitrability to arbitration, . . .the arbitrability of the Kaplan/First Options dispute was subject to independent review by the courts." *Id.* at 947. On the facts of the case, the Kaplans had not agreed to submit *any* disputes to arbitration because they never entered into an agreement to arbitrate with First Options. *Id.* at 941. The Court recognized that the FAA permits parties to draft arbitration clauses that cover disputes over the arbitrability of individual claims, *id.* at 943, but it never suggested that if the First Options/MKI agreement *had* clearly covered arbitrability disputes, it would have required the Kaplans, as *non-signatories to that agreement*, to forego access to court and submit to arbitration. Such creation of a party's duty to arbitrate in the absence of an agreement to do so would have been contrary to decades of precedent interpreting and applying the FAA.

Like the Court's prior decisions involving the FAA, *First Options* is grounded in contract principles. The Court applied these principles to the difficult question of who decides arbitrability under the Act. In recognizing that "the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter," 514 U.S. at 943 (emphasis in original), *First Options* presupposes the existence of an enforceable agreement to arbitrate between the parties. Still, the Court proceeded cautiously in this area by recognizing a presumption *against* submitting arbitrability disputes to an arbitrator, reversing the normal presumption regarding the scope of agreements under the FAA. *First Options*, 514 U.S. at 945. This reverse presumption is based entirely on the need for a party's *meaningful* assent to the arbitrator's authority:

> the "who (primarily) should decide arbitrability" question is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers. And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

Id. Since *First Options* highlights the Court's long-standing recognition that "arbitration is simply a matter of contract," *id.* at 943, it is perfectly consistent with the Court's earlier ruling in *Prima Paint* that only courts have authority under the FAA to resolve disputes over the existence and validity of an agreement to arbitrate.

B. The Weight of Authority Post-*First Options* Continues to Support the Requirement that Courts Alone Determine the Existence and Enforceability of Arbitration Agreements.

After *First Options*, some businesses began drafting mandatory consumer and employment arbitration clauses that explicitly cover disputes over arbitrability. These businesses have then argued based on the Court's discussion of arbitrating arbitrability disputes in *First Options* where there was no arbitration agreement and based on the Court's imprecise

definition of arbitrability as referring to "whether [the parties] agreed to arbitrate the merits," *id.* at 942, that *First Options* requires arbitration of challenges to whether the parties entered into an enforceable agreement to arbitrate in the first place. In essence, this argument requires a court to rubberstamp any broadly worded arbitration clause, enforcing the purported waiver of a consumer's or worker's right of access to court *without regard* to the FAA's requirement of an enforceable agreement under applicable state contract law. Most courts presented with this argument have rejected it, but a small number have taken the bait and abdicated their duty under the FAA to ensure the existence of an enforceable agreement *before* they order parties out of court.

Courts rejecting this argument for a radical expansion of *First Options* have placed that decision in context and continue to recognize the FAA's contractual underpinnings. One of the first courts to consider the effect of *First Options* held that it does not change *Prima Paint's* requirement that a court decide any allegation that an arbitration clause is generally unenforceable; it only permits parties to agree to arbitrate whether a particular claim is arbitrable after such allegations have been resolved. *Aviall, Inc. v. Ryder Sys., Inc.*, 913 F. Supp. 826, 831 (S.D.N.Y. 1996), *aff'd*, 110 F.3d 892 (2d Cir. 1997). The *Aviall* court found that, under *First Options*, "the related and antecedent issue of whether an agreement to arbitrate is a contract of adhesion, fraudulently induced, or otherwise revocable, is an issue for the court as well, because *essential to the First Options inquiry is the assumption that an*

agreement to arbitrate was made voluntarily." *Id.* (emphasis added).[6]

The limited secondary authority examining the effect of *First Options* is in accord with this approach. As one commentator explained:

> The federal presumption [in favor of arbitration] should not be permitted to taint the threshold question of whether an agreement exists, a pure question of state law. . . . *The question of whether a valid arbitration agreement exists is not a question about the scope of arbitrable issues. The scope of arbitrable issues is not implicated until after a court has decided an agreement exists.*

Note, Tripping on the Threshold: Federal Courts' Failure to Observe Controlling State Law Under the Federal Arbitration

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[6] *See also Berger v. Cantor Fitzgerald Sec.*, 942 F. Supp. 963, 965 (S.D.N.Y. 1996) (in employment discrimination case under Title VII and state civil rights statutes, adopting *Aviall's* interpretation of *First Options*); *Prevot v. Phillips Petroleum Co.*, 133 F. Supp. 2d 937, 939-40 (S.D. Tex. 2001) (in workplace injury case, rejecting employer's argument that non-English speaking workers' allegation that arbitration clause is unconscionable must be arbitrated); *Oakwood Mobile Homes, Inc. v. Barger*, 773 So.2d 454, 459 (Ala. 2000) (in case involving consumer claims against mobile home manufacturer, following *Aviall* and finding that claim of fraud in inducement of arbitration agreement covering arbitrability disputes is antecedent to enforcement); *Green Tree Financial Corp. of Ala. v. Wampler*, 749 So.2d 409, 413 (Ala. 1999) (in consumer case involving mobile home financing, holding that under *First Options*, even where arbitration clause covers arbitrability disputes, court must decide challenges to enforceability of arbitration clause).

Act, 51 DUKE L.J. 521, 537 (2001) (emphasis added).[7] This understanding of *First Options* is consistent with the long-standing principle of federal law that the power of private arbitrators is not free-standing and plenary, but rather is strictly a matter of voluntary contractual agreement.[8]

Prompted by businesses that are determined to deprive consumers and other claimants of any meaningful access to court, a small number of courts have abandoned this principle by expanding *First Options* to sanction mandatory arbitration of allegations challenging the very existence or enforceability of a purported agreement to arbitrate. One state court of appeals ordered arbitration of consumer claims challenging the practices of a tax "refund anticipation loan" provider without ever deciding the consumers' claim that the lender's arbitration clause was unenforceable. Instead, the court found that the lender's arbitration clause covered disputes regarding the validity and enforceability of the arbitration clause itself, and that "[t]he United States Supreme Court has decided that parties may contract to arbitrate this type of dispute under the FAA even if state law would prevent arbitration." *Berkley v. H & R*

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[7] *See also* Comment, Prima Paint to First Options: The Supreme Court's Procrustean Approach to the Federal Arbitration Act and Fraud, 38 HOUS. L. REV. 335, 364 (2001) (noting with approval cases recognizing that "the assumption that an agreement to arbitrate was voluntarily made is essential to the First Options inquiry" and therefore that "the related and antecedent question of whether the agreement was a product of fraud, unconscionability, or coercion must be an issue for the courts . . . .")

[8] *See generally*, Archibald Cox, Reflections Upon Labor Arbitration, 72 HARV. L. REV. 1482, 1507 (1959) ("Possibly it would be wiser . . .to treat [arbitrators] as courts of general jurisdiction. This solution cannot be imposed in blanket fashion, however, so long as arbitration is consensual and the function of the court is to enforce a voluntary undertaking.")

Block Eastern Tax Servs., Inc., 30 S.W.3d 341, 344 (Tenn. App. 2000), *appeal denied* (Tenn. Nov. 6, 2000), *cert. denied*, 532 U.S. 971 (2001).[9]

Under this expansion of *First Options*, a consumer or worker who might never have agreed to arbitrate must forego access to court and proceed through private arbitration in order to find out whether a document proffered by a defendant that contains the words "arbitrate arbitrability disputes" creates an enforceable agreement. The Court never has sanctioned this practice. *First Options* addresses the very different issue of whether an arbitrator can have authority to decide the scope of a valid arbitration agreement. Even here, *First Options* warned that courts should proceed with caution because of the "arcane" nature of disputes over who decides arbitrability. But this minority of courts shows no caution whatsoever in expanding *First Options* to require arbitration of disputes over the very existence and legality of an arbitration agreement, and in discerning, for example, a low income borrower's "clear and unmistakable" intent to waive all meaningful access to court based entirely on a few words in a lender-drafted document. This approach is not consistent with *First Options* and does not comport with the voluntary contractual underpinnings of arbitration under the FAA.

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[9] *See also Perry v. Hyundai Motor Am., Inc.*, 744 So.2d 859, 867 (Ala. 1999) (holding that *First Options* sanctions arbitration of disputes involving "waiver, enforceability, validity, scope of the arbitration agreement"); *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 n.3 (Tex. 1999) (holding in consumer case against mobile home seller that, under the FAA, issue of whether terms and conditions of arbitration clause are unconscionable must be arbitrated).

C. This Court's Decisions Grounding the FAA in Contract Law Provide a Base Level of Fairness for Parties with Limited Choice Regarding Arbitration.

The FAA's requirement for a judicial determination that parties entered into an enforceable agreement to arbitrate under applicable state contract law principles is more than a mere formality. In holding that statutory claims of workers and other individuals are subject to arbitration under the FAA, the Court specifically pointed to Section Two's savings clause and warned that "'courts should remain attuned to well-supported claims that the agreement resulted from overwhelming economic power that would provide grounds for the revocation of any contract.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991)(quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (internal quotation omitted)). In subsequently defining the scope of the FAA's preemptive effect, the Court reiterated that "generally applicable contract defenses such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Under the FAA, these principles of state contract law are the primary source of protection for consumers and other individuals against unknowing waivers of their rights and against unfair and one-sided arbitration systems.[10]

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[10] *See, e.g., Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069 (5th Cir. 2002) (holding that minor children injured by exposure to formaldehyde in mobile home are not bound by manufacturer's arbitration clause signed by parents before they were born); *Gourley v. Yellow Transp., LLC*, 178 F. Supp. 2d 1196 (D. Colo. 2001) (holding that female employees' sex discrimination claims did not have to be arbitrated because asserted agreement gave employer unilateral power to interpret, modify, rescind, or supplement its terms).

An expansion of *First Options* to require arbitration of the threshold questions that precede disputes over the scope of an arbitration agreement would read the contract requirements out of the FAA and leave consumers, workers, and other parties of limited bargaining power with little or no ability to protect their rights. This Court has proclaimed repeatedly that "the FAA is 'at bottom a policy guaranteeing the enforcement of private contractual arrangements,'"[11] that the Act does no more than place arbitration agreements "'upon the same footing as other contracts,'"[12] and that "the FAA does not require parties to arbitrate when they have not agreed to do so."[13] A requirement that parties arbitrate disputes over whether they ever entered into an enforceable arbitration agreement would fundamentally alter the nature of arbitration under the FAA, and drastically diminish the rights of individual parties.

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[11] *See, e.g.,Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 122 S. Ct. 754, 764 (2002) (quoting *Mitsubishi Motors*, 473 U.S. at 625).

[12] *Volt Info. Sciences*, 489 U.S. at 474 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)) (internal quotation omitted).

[13] *Volt Info. Sciences*, 489 U.S. at 478.

CONCLUSION

In determining the effects of *First Options* and the wording of Dean Witter's arbitration clause on the dispute over the timeliness of Howsam's arbitration filing, the Court should make clear that any dispute regarding the existence and enforceability of an arbitration agreement must be resolved by a court under the FAA.

Respectfully submitted,

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